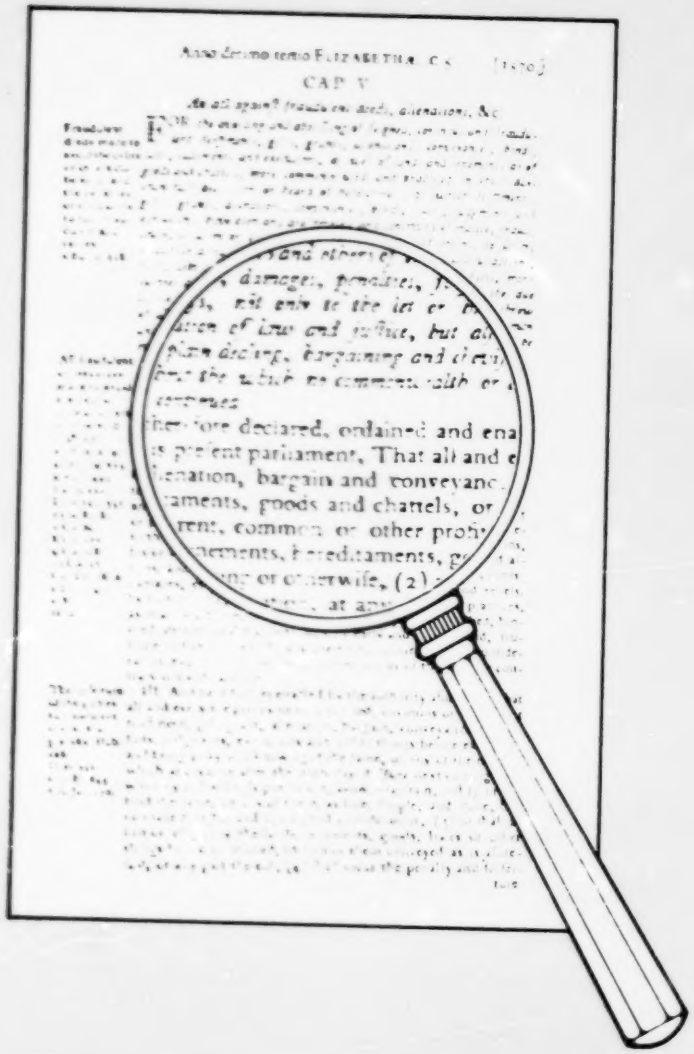
Law Reform Commission of Saskatchewan

Proposals for Restoring Civil Remedies Lost upon Forfeiture under The Automobile Accident Insurance Act

Report to the Minister of Justice

Saskatchewan



PROPOSALS FOR RESTORING CIVIL REMEDIES LOST UPON FORFEITURE UNDER THE AUTOMOBILE ACCIDENT INSURANCE ACT

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

October, 1984

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor DOUGLAS A. SCHMEISER, Q.C., B.A., LL.B., LL.M, S.J.D., Chairman

Miss MARJORIE A. GERWING, Q.C., B.A., LL.B.

Mr. GORDON J. KUSKI, Q.C., LL.B.

Mr. Kenneth P. R. Hodges, B.A., LL.B. is Director of Research.

Mr. Michael J. W. Finley, B.A., M.A., LL.B. and Mr. C. Peter Thagard, LL.B. are the Legal Research Officers, and Mr. Roderick J. Wood, LL.B., LL.M., Dip. in Legislative Drafting and Mrs. Sandy Antonini-Ready, LL.B. are Legal Research Officers under contract. The secretaries are Mrs. Sandra Ritchie and Miss Pat Harasymchuk.

Mr. Richard T. Carlson, Barrister and Solicitor of Saskatoon, Saskatchewan served as Consultant to the Commission on the proposals for amending The Automobile Accident Insurance Act.

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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Saskatchewan

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Saskatchewan

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The Honourable J. Gary Lane, Q.C.
Minister of Justice
Province of Saskatchewan
Regina, Saskatchewan

Dear Mr. Minister:

In November 1982, the Commission wrote to all members of the Law Society of Saskatchewan, inquiring whether they had encountered laws which were inconsistent or were perceived as unjust, with a view to possible research and reform. Mr. Richard T. Carlson of Saskatoon suggested that the Commission consider the effect of non-registration of a vehicle on the rights of a driver involved in an accident which was not his fault.

A report has been prepared recommending amendment of The Automobile Accident Insurance Act. This report is hereby submitted pursuant to section 9 of The Law Reform Commission Act.

Respectfully submitted this 20th day of September, A.D. 1984.

Douglas A. Schmeiser, Q.C.,
Chairman

Marjorie A. Gerwing, Q.C.,
Commissioner

Gordon J. Kuski, Q.C.,
Commissioner

PROPOSALS FOR RESTORING CIVIL REMEDIES LOST UPON FORFEITURE UNDER THE AUTOMOBILE ACCIDENT INSURANCE ACT

I. INTRODUCTION

Saskatchewan has since 1947 had a compulsory system of automobile accident insurance. Intrinsic to the insurance scheme is a system for registration of motor vehicles. Vehicle registration gives rise to certain insurance coverages. Registration is evidenced by licence plates, and so the coverage arising from registration is often colloquially referred to as "plate insurance". Under *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 ("the A.A.I.A."), plate insurance can be lost by a failure to renew the registration when it expires, or can be forfeited by a breach of any term or condition set out in the Act. For example, operation of the vehicle by a person who does not have a valid operator's licence, or who is impaired by alcohol or drugs, results in forfeiture.

Under the A.A.I.A., forfeiture means a loss of the plate insurance coverages. This is neither surprising nor unreasonable. There is, however, an additional consequence independent of the insurance scheme: forfeiture can effect the rights in tort of the parties involved in a motor vehicle accident. It is this effect of forfeiture under the A.A.I.A. that this report concerns.

The tort consequences of insurance forfeiture can be illustrated best by an example. Consider the position of the owner of an automobile whose plate insurance is about to expire, and who forgets to renew his vehicle registration. The day after his plate insurance expires, while he is stopped at a red light, his vehicle is struck by another motor vehicle. The other driver is totally at fault. On these facts, the failure to renew the vehicle's registration results in the following consequences:

(i) The owner of the unregistered vehicle may be charged with an offence under *The Vehicles Act* (this is the "criminal" consequence);

(ii) the owner of the unregistered vehicle cannot receive any sum from Saskatchewan Government Insurance ("S.G.I.") in respect of his personal injuries or damage to his vehicle (the "insurance" consequence); and

(iii) the right of the owner of the unregistered vehicle to claim in tort against the owner or operator of the other vehicle is severely curtailed by *The Automobile Accident Insurance Act* (the "tort" consequence).

The problem lies in this third consequence. The Commission has been advised of instances where the accidental omission to renew an operator's licence or vehicle registration has resulted in the unrecoverable loss of an automobile which constituted a major family asset. The potential for hardship is obvious. The Commission believes that most people in Saskatchewan would be surprised to learn that an uninsured driver whose conduct did not in any way contribute to an accident is prevented from recovering his losses from another driver whose negligence did cause the accident. Moreover, the Commission is of the opinion that most people in Saskatchewan would consider this result to be unfair.

II. THE AUTOMOBILE ACCIDENT INSURANCE ACT

The statutory insurance scheme created by the A.A.I.A. establishes three types of coverage. Part II of the Act insures any person in respect of personal injuries suffered in a collision in which at least one motor vehicle is involved. This coverage is universal, in that it does not depend on the existence of an operator's licence or vehicle registration; a pedestrian struck by a motor vehicle is also an insured. "Indemnity" under Part II is calculated according to statutory formulae, and will usually be less than the injured party would be entitled to claim in a tort action. Part II benefits are available regardless of fault.

Part III of the Act is concerned with damage to property, and the coverage stems from registration of a motor vehicle. This coverage is also no-fault. If an insured's automobile is damaged in a collision, he is entitled to recover from S.G.I. the amount of the damage, less the prescribed deductible, which at present is $500.00.

Part IV provides liability insurance. This coverage also is premised on registration of a motor vehicle. It indemnifies the operator of a registered vehicle against claims for personal injuries or property damage suffered by persons other than the owner or operator of the registered vehicle.

In the ordinary case of a collision between two registered vehicles, assuming that each is being operated by its owner and that the collision is caused by the negligence of one of the drivers, the three types of coverage come into play as follows:

(i) the driver at fault (A) is entitled to Part II benefits for his personal injuries and Part III benefits for damage to his vehicle, respectively;

(ii) the other driver (B) also recovers Part II and Part III benefits;

(iii) B has a right of action against A for

  (a) the amount by which his actual personal injury damages exceed his Part II benefits; and

  (b) the deductible under Part III, that is $500.00;

(iv) as A's Part IV insurance applies in respect of the amounts set out in (iii), B can recover these amounts from S.G.I.

Generally, the A.A.I.A. preserves the basic right of a person who suffers personal injuries or property damage through the negligent operation of a motor vehicle by another to bring an action in tort against that person. However, to the extent that insurance benefits are available on a no-fault basis (i.e., under Parts II and III), the tort relationship is thereby modified. The A.A.I.A. expressly provides that the claim of a plaintiff against a defendant is reduced by the plaintiff's Part II and Part III benefits.[1] The purpose of this provision is to prevent double recovery.[2] The Act goes further, however, and provides that where a person has forfeited his right to Part II and Part III benefits, any right of action he may have had against the other operator or owner is reduced by the amount of Part II and Part III benefits for which he would have been eligible but for the forfeiture.[3] By limiting civil remedies in this way, the A.A.I.A. effectively prevents full recovery of the losses suffered by the person who has forfeited insurance benefits. Such a person can claim in a negligence action only the amount by which his actual personal injury damages exceed the benefits he would have been entitled under Part II, together with the $500.00 deductible under Part III.

Section 78 sets out the circumstances in which forfeiture will occur. It is now clear from the Saskatchewan Court of Appeal decision in *Frehlick* v. *McLenehan*[4] that a breach of any term or condition contained in any part of the A.A.I.A. will constitute forfeiture. It is also settled that section 65, which allows a court to grant relief from forfeiture in certain cases, applies only to forfeiture following from failing to comply with procedures for filing a claim.[5]

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1. Subsection 79(1).
2. *Roland* v. *Dean*, [1961] 35 W.W.R. 13, Sask. C.A., per Culliton, J.A. at p. 19.
3. Clause 79(1)(d). Actually, an argument can be made that the effect of this provision is to completely bar any action by a person who falls within the forfeiture provisions of section 78. However, a detailed reading of the various intertwined provisions supports the more restricted effect of clause 79(1)(d), and the case law generally supports such a construction.
4. (1981), 114 D.L.R. (3rd) 310; (1980), 3 Sask. R. 340.
5. *Friesen* v. *Saskatchewan Government Insurance* (1962), 39 W.W.R. 378 (Sask. C.A.).

This approach to forfeiture is almost unique to Saskatchewan; Manitoba is the only other province where forfeiture of insurance benefits affects the rights in tort of the parties involved in a motor vehicle accident.[6]

It should be noted that subsection 78(2) of the A.A.I.A. provides one exception to the rule that a person in breach of a term of the statutory insurance scheme loses any right of action insofar as his forfeited Part II and Part III benefits are concerned. Where 90 days after the accident the person in breach of the insurance scheme is permanently disabled, he may, depending on the nature of the breach, be eligible for Part II benefits. This relatively narrow exception need not be further mentioned herein.

III. ANALYSIS OF THE PROBLEM

Conceptually, it is not difficult to see how the consequences of forfeiture fit in with the overall scheme of the A.A.I.A. Under Part IV, registration of a motor vehicle provides insurance against "liability imposed by law"[7] on the insured. However, because claims in negligence are reduced under the A.A.I.A. by the amount of Part II and Part III benefits, such amounts are not encompassed by "liability imposed by law". Because this method has been adopted to integrate Parts II and III with Part IV, a problem would arise if the parties' tort rights *inter se* were unaffected by the forfeiture, unless the application of Part IV were also adjusted. Suppose, for example, that the "tort consequence" is deleted, but the general application of Part IV is left unchanged. A's insured vehicle causes an accident with a vehicle owned and operated by B, who does not have a valid operator's license. B cannot recover any benefits under Part II or Part III of the Act. B can sue A and recover judgment for all personal injuries and property damages suffered. When A looks to S.G.I. for indemnity, however, he is entitled to recover only the amount by which B's judgment exceeds the insurance benefits to which B would have been entitled if he had not forfeited Part II and Part III benefits. A, although properly insured, may be substantially out of pocket. He would not have been out of pocket had he collided with a properly insured vehicle. It is thus apparent that the operation of Part IV requires adjustment if the rights in tort of parties invoved in an accident are to be unaffected by forfeiture of Part II and Part III benefits.

The drafters of the A.A.I.A. could have provided for expanded Part IV benefits where a non-negligent driver has forfeited Part II and Part III benefits. This might have been done by extending the scope of Part IV benefits in such situations to include all third party liability. They did not do so. Only two arguments can be advanced as to why Part IV benefits should not be so extended. In the Commission's view, neither is valid. First, if the non-negligent driver who has forfeited Part II and Part III benefits can obtain a complete recovery by looking to the other driver's Part IV coverage, the forfeiture is of no consequence. From the point of view of the insurer, it can be argued that an insured who is in breach of the terms of his insurance ought not to be able to recover from the same insurer via the back door.[8] The fallacy in this argument, however, is that it is not material to the questions of tort liability or insurance coverage that both parties happen to have the same insurer. The following example is illustrative:

— A is insured by ABC Ltd. for personal injuries, property damage and third party liability;

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6. *The Automobile Insurance Act*, S.M. 1970, c. 103, s. 33, as amended by S.M. 1974, c.58.

7. Subsection 42(1).

8. This is discussed by Bayda, J. A., in the course of his reasons for judgment in *Frehlick* v. *McLenehan, supra* footnote 4. However, the present section 79 is basically the same as section 48 contained in the original 1947 statute, and it may be suggested that the policy behind the 1947 provision is out of step with modern principles of tort law.

- B has the same insurance with XYZ Inc.;
- B forgets to renew his insurance with XYZ Inc., so that it lapses;
- A and B are involved in an accident for which A is wholly at fault;
- A and B each suffer personal injuries and property damages.

On these facts, and assuming that no statutory scheme such as the A.A.I.A. is in existence, the following results obtain:

- A recovers his personal injury damages and property damages (less any deductible) from ABC Ltd.;
- B has no claim against XYZ Inc.;
- B has a right of action against A for his personal injury and property damages;
- ABC Ltd., on behalf of A, pays B's damages, to the limits stated in the policy.

If the facts are changed slightly, so that ABC Ltd. and XYZ Inc. are one and the same insurance company, do the results change? They do not.

The second argument is that people should be deterred from operating unregistered vehicles, driving without a driver's license, or driving while impaired, etc. It might be argued that to allow a party in breach of the Act full recovery is to condone the breach. The answer is that such deterrence is the function of the criminal law. The *Criminal Code* provides a penalty for impaired driving. *The Vehicles Act*, R.S.S. 1978, c. V-3, penalizes driving without a license or driving an unregistered vehicle. If such penalties are not a sufficient deterrent, the penalty provisions themselves should be reconsidered. The insurance relationship and the tort relationship between the parties involved ought not to be used to further penalize the offender. Tort law should be more concerned with compensation than with punishment, and the concept of compensation is also fundamental to insurance law.

It may have been that in 1947, when the statutory insurance scheme was first introduced, a central concern of the legislators was to ensure that all owners and operators of motor vehicles be brought into the system. This might explain the very serious sanction in terms of civil remedies that would apply to an owner who might consider "opting out" of the plan by refusing to register his vehicle. Today, however, the goal of universality has clearly been attained, so that the loss of civil remedies stands less as a deterrent than a trap for the careless.

Another consideration is that distorting the tort relationship to penalize objectionable conduct creates the very real risk that the punishment will not fit the crime. Under the A.A.I.A. as it now stands, an impaired driver stopped at a red light whose $15,000.00 automobile is demolished by a negligent driver would in effect pay a penalty of $14,500.00 for driving while impaired. This penalty would be in addition to a fine, licence suspension and possible imprisonment.

This returns us to the three types of consequences of forfeiture, discussed earlier in this report. Breach of a term of the statutory insurance scheme may or may not be a criminal or provincial offence, but this question is not central to the statutory insurance scheme. The insurance relationship between S.G.I. and an insured is properly affected by a breach of the terms of the insurance contract or scheme, so that forfeiture of Part II and Part III benefits can be seen as logically following from such breach. On the other hand, other than the need to prevent double recovery, there is no rational connection or link between breach of the insurance contract and liability in tort between drivers and owners. For this reason, the Commission is of the opinion that forfeiture under section 78 of the A.A.I.A. ought not to affect tort rights between parties involved in an accident.

The irrelevance in a tort action of forfeiture of insurance coverage by a non-negligent driver can be demonstrated. Consider two automobiles stopped at a red light. One is being operated by A,

whose blood alcohol level exceeds the legal limit. The other is operated by B, who has not been drinking. A third vehicle, bearing Alberta licence plates and operated by C, is approaching the intersection. If he collides with B, C (or his insurer, as the case may be) will be liable for B's damages. But if he runs into A, his liability to A is severely limited by the A.A.I.A.[9] Why should C escape the consequences of his actions, at the expense of A? The only difference between A and B is the consumption of alcohol, which played no part in the accident. What is missing is the element of causation, an element fundamental to negligence law.

IV. RECOMMENDATIONS

This problem was originally considered by the Commission in terms of a person who accidentally omits to renew his operator's licence or vehicle registration. Because further analysis has demonstrated the conceptual irrelevance between the forfeiture and the tort relationship, the Commission has concluded that the same result should follow regardless of the nature of the breach. The Commission gave consideration to ameliorating the present rules by extending the right to apply for relief from forfeiture. Once again, because of the absence of a significant nexus between the insurance relationship and the tort relationship, the right of a non-negligent driver to bring action against a negligent driver for damages suffered in an automobile accident should not depend on a judge's discretion.

This is not to suggest that driving while impaired or unlicensed should be of no consequence. Criminal or quasi-criminal penalties remain applicable. And if the offending driver causes or contributes to an accident, the financial results could be devastating for him.[10] The driver who fails to comply with the terms of the statutory scheme should be responsible for the consequences of his actions, but he should not be liable for consequences that do not follow from his actions.

In summary, the Commission recommends that *The Automobile Accident Insurance Act* be amended so that loss or forfeiture of insurance benefits under Part II or Part III of the Act does not impair the claim of an insured in an action in negligence against the operator or owner of another vehicle involved in the accident.

The required amendment can be effected by deleting from subsection 79(1) of the A.A.I.A. the references to "forfeiture".[11] Subsection 79(2) should be deleted, as well as the reference in subsection (3) to subsection (2). The net result will be to allow a non-negligent driver who has forfeited Part II and Part III rights full recovery from the driver at fault, who may look to Saskatchewan Government Insurance for reimbursement under Part IV of the Act.

[9] It is curious that the Act, being essentially a provincial statutory insurance clause, appears to affect the rights of out-of-province drivers who are not required to be part of the insurance scheme. However, it is clear from the wording of section 79 that its ambit is extensive. Equally curious is that the Act even affects tort liabilities between two uninsured drivers, as long as at least one was required under the Act to have been registered; see subsection 79(2).

[10] By section 80 of *The Automobile Accident Insurance Act*, a driver at fault who is also in breach of the statute is unable to recover any insurance monies for his own losses or injuries, and in addition is liable to reimburse S.G.I. for any monies paid out under Parts II, III or IV to other parties involved in the accident.

[11] Section 79 of *The Automobile Accident Insurance Act* is reproduced as Appendix A; the portions of the section that the Commission recommends be deleted are underlined; and, in subsection (3), the words "Subsections (1) and (2) apply" have been replaced with the words "Subsection (1) applies".

APPENDIX A

Section 79 of *The Automobile Accident Insurance Act*:

79.(1) Except for the purpose of section 80, wherever loss, damage, injury or death, arising out of or resulting from the use or operation of a vehicle designated in an unexpired owner's certificate, is suffered by a person through any of the means mentioned in section 22 or 38, the liability of:

(a) the owner of the vehicle, if, at the time when the event resulting in the loss, damage, injury or death occurs, the vehicle is being operated by a person who is qualified and authorized by law to drive the motor vehicle; and

(b) the operator of the vehicle, if, at the time when the event resulting in the loss, damage, injury or death occurs, he is qualified and authorized by law to drive the motor vehicle;

in respect of the loss, damage, injury, or death to the person suffering the same, his dependants and to all others claiming through or on behalf or in respect of any such person and his dependants or any of them, shall be reduced, in direct suit or way of contribution or otherwise:

(c) by the total of all payments made or to be made by the insurer under Parts II and III, in respect of the loss, damage, injury or death to such person, his dependants, and to all persons on behalf or in respect of any or all of them; *or*

Underlined portions to be deleted

where the person suffering the loss, damage, injury or death, his dependants, or anyone claiming through, on behalf or in respect of any of them, or all of them, have forfeited the right to claim any or all payments under Parts II and III, by reason of section 78 or have failed to make claim under this Act with respect to the loss, damage, injury or death or are not entitled to any payment under Part III by reason of condition 12 of the statutory conditions set forth in section 39;

(d) by the maximum amount that the insurer would have been authorized or required to pay to the person suffering the loss, damage, injury or death, his dependants and to all persons claiming through, on behalf or in respect of any or all of them but for the forfeiture or but for failure to make such claim or but for the operation of the said condition 12.

(2) Where a vehicle is lost or damaged in an occurrence involving another vehicle and where the liability, for the loss or damage, of the owner or operator of that other vehicle is not reduced under subsection (1) by reason only that the vehicle lost or damaged is not designated in an unexpired owner's certificate the liability, for the loss or damage, of

the owner or operator in direct suit or by way of contribution or otherwise shall be reduced by the maximum amount that the insurer would have been authorized or required to pay under Part III with respect to the loss or damage if:

(a) the vehicle lost or damaged had been designated in an unexpired owner's certificate;

(b) all the terms and conditions of this Act had been complied with; and

Underlined portions to be deleted

(c) a claim had been duly made under Part III with respect to the loss or damage;

provided that the vehicle lost or damaged is one that is required to be registered under *The Vehicles Act* or *The Snowmobile Act* and is not so registered.

(3) Subsection (1) applies *mutatis mutandis* with respect to the liability of a person who with the consent of the owner has the care, custody or control of a vehicle, for loss or damage resulting from damage to the vehicle, but this subsection does not apply with respect to the liability of a person who:

(a) has the care, custody or control of the vehicle in the course of the business of selling, repairing, servicing, storing, or parking automobiles; or

(b) while having the care, custody or control of the vehicle, failed to observe and perform as fully as if he were the insured named in the owner's certificate in which the vehicle is designated all the statutory conditions set forth in section 39 and required by that section to be observed and performed by the insured.

(4) In any case where it is material to the application of this section to estimate the value of future payments of indemnity to be made to a claimant under Part II or that the insurer is authorized or required to pay under that Part, such value shall be estimated according to the present day value of a deferred benefit calculated for the period in respect of which those future payments are or are authorized or required, as the case may be, to be made.